

STATE OF MICHIGAN
COURT OF APPEALS

SCHLANE GRANBERRY,

Plaintiff-Appellant,

v

HARPER HOSPITAL and HARPER-HUTZEL
HOSPITAL,

Defendants,

and

WESTERN WATERPROOFING COMPANY,

Defendant-Appellee.

UNPUBLISHED

August 29, 2006

No. 266775

Wayne Circuit Court

LC No. 02-240858-NO

Before: Neff, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders granting summary disposition in favor of defendant¹ and denying plaintiff's motion for reconsideration. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

When walking into the hospital's main entrance, plaintiff caught her right toe under a large metal sheet that was covering an area on which defendant had been contracted to conduct an "expansion joint repair." Plaintiff lost her balance and fell after her left foot slid across the sheet, which had gravel or sand on it. According to defendant, although it preferred to barricade all areas under construction during the project, it was advised by the hospital that metal sheets should be placed over the exposed areas so that patrons could continue to have full access to the

¹ The term "defendant" as used in this opinion refers solely to defendant Western Waterproofing Company unless otherwise indicated. Defendants Harper Hospital and Harper-Hutzel Hospital were granted summary disposition as ordered by this Court following their appeal from the trial court's order denying their motion, and are not parties to this appeal. *Granberry v Harper Hosp*, unpublished order of the Court of Appeals, entered July 15, 2004 (Docket No. 256075).

main entrance. Defendant complied with this request and covered all exposed areas with metal sheets, to allow patrons to traverse the exposed areas to enter the hospital.

Plaintiff brought claims of negligence and breach of contract (as a third-party beneficiary) against defendant.² The trial court granted summary disposition in favor of defendant and denied plaintiff's motion for reconsideration on the ground that, under *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004), defendant owed no duty to plaintiff that was separate and distinct from its contractual obligation to the hospital.

We review de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004).³ After reviewing the evidence in a light most favorable to the nonmoving party, the trial court may grant summary disposition under MCR 2.116(C)(10) if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Id.* We review for an abuse of discretion a trial court's decision to grant or deny a motion for reconsideration. *Bergen v Baker*, 264 Mich App 376, 381; 691 NW2d 770 (2004). Additionally, whether a defendant owes a duty to a plaintiff is a question of law that we review de novo. *Fultz*, *supra* at 463.

"The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff." *Id.* "If [a] defendant negligently performs a contractual duty arising by implication from the relation of the parties created by the contract, the action may be either in contract or in tort. In such cases, however, no tort liability arises for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made." *Id.* at 469-470. However, "a subcontractor has a common-law duty to act in a manner that does not cause unreasonable danger to the person or property of others." *Ghaffari v Turner Constr Co(On Remand)*, 268 Mich App 460, 466; 708 NW2d 448 (2005). Thus, a subcontractor breaches a duty that is "separate and distinct" from the contract when it creates a "new hazard" that it should have anticipated would pose a dangerous condition to third persons. *Fultz*, *supra* at 468-469. Whether a duty exists depends partially on foreseeability—whether it was foreseeable that a defendant's conduct may create a risk of harm to another person and whether the result of the defendant's conduct and intervening causes was foreseeable. *Ghaffari*, *supra* at 465.

Plaintiff has failed to set out facts demonstrating that defendant owed her any duty separate and distinct from its contractual obligations. To the extent plaintiff argues that defendant's alleged breach of its contractual duty to provide signage and barricades constitutes a

² Plaintiff's premises liability claim against the Harper defendants was, pursuant to this Court's order, dismissed on the basis that the condition created by the placement of the metal sheet was open and obvious.

³ Defendant's motion for summary disposition was brought under MCR 2.116(C)(8) and (C)(10). Because the parties submitted documentary evidence and because the trial court relied on that evidence, we treat the motion as having been granted under (C)(10). See *Mino v Clio School Dist*, 255 Mich App 60, 63 n 2; 661 NW2d 586 (2003).

basis for liability, her claim must fail. Only a direct beneficiary of a contract, and not a mere incidental beneficiary, may seek enforcement of a contract as a third-party beneficiary. MCL 600.1405; *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427-428; 670 NW2d 651 (2003). Plaintiff's claim fails because any duty to provide signage and barricades arose solely under the contract and is not a "separate and distinct" duty from those owed under the contract. *Fultz*, *supra* at 470. Moreover, "a failure to act does not give rise to a separate legal duty in tort." *Ghaffari*, *supra* at 467.

Further, plaintiff has failed to set out any evidence demonstrating that the placement of a metal sheet over an excavated area constituted a new hazard that created an "unreasonable danger" to others. *Id.* at 466. It is not evident that people traversing the area were in danger of injury due to the presence of the plate or that the plate (or its allegedly raised edge) was not visible upon casual inspection. Rather, as this Court noted in its prior order, the evidence indicates that plaintiff fell simply because she was not looking where she was going. Although plaintiff has repeatedly characterized the sheet as being covered with dirt and debris and "indistinguishable" from the surrounding area, there is no record support for this assertion⁴; indeed, plaintiff herself testified that she would probably have seen the sheet if she had been watching where she was going. Further, plaintiff's allegation that the sheet harbored an "upturned lip just large enough for a person's foot to get caught underneath" is unsupported. Although plaintiff testified that her foot somehow became lodged underneath the sheet, there is no evidence that it had a raised edge. Similarly, there is no support for plaintiff's assertion that "the area was previously safe for pedestrian traffic." Speculation and conjecture are insufficient to create an issue of material fact. *Id.* at 464.

Because plaintiff failed to set out facts demonstrating that defendant owed her any duty separate and distinct from its contractual obligations, summary disposition was appropriately granted. Similarly, because plaintiff failed to "demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error," MCR 2.119(F)(3), the trial court did not abuse its discretion in denying plaintiff's motion for reconsideration.

We affirm.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Brian K. Zahra

⁴ This Court has previously taken issue with plaintiff's failure to cite record support for this assertion, and plaintiff's continued failure to provide this Court with specific record references for this and other factual assertions as required by MCR 7.212(C)(6) is most vexing.